No. 17-961

In The
Supreme Court of the United States

THEODORE H. FRANK and
MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, On Behalf of Herself
and All Others Similarly Situated, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF FORMER PROFESSOR ROY A. KATRIEL AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Amicus will address the following question:

Whether a class member who voluntarily joins a Rule 23(b)(3) class action settlement has Article III standing to appeal a district court's approval of the settlement.

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INTEREST OF *AMICUS CURIAE*[1]

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, section 2, of the Constitution provides in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the

[1] The parties have consented in writing to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than the *amicus curiae* made a monetary contribution intended to fund its preparation or submission.

citizens thereof, and foreign states, citizens or subjects.

Pertinent statutory provisions are reprinted in an appendix to this brief.

SUMMARY OF ARGUMENT

This Court lacks Article III jurisdiction to review this case. Petitioners, absent class members who voluntarily elected to join a proposed class action settlement certified under Federal Rule of Civil Procedure 23(b)(3), lack Article III standing to challenge the very settlement they elected to join. Under Federal Rule of Civil Procedure 23(b)(3), petitioners were provided notice and an opportunity to exclude themselves from the proposed settlement and avoid being bound by its terms. Petitioners elected not to opt out of the class settlement. They now lack standing to appeal the judgment entered under a settlement they voluntarily joined.

A. Petitioners rely only on *Devlin v. Scardelletti*, 536 U.S. 1 (2002), to assert that "[a]s class members who objected to the settlement, petitioners have standing to appeal the final judgment." Pet. Br. at 3 (citing *Devlin*). *Devlin*, however, does not support petitioners' appellate standing. Unlike this Rule 23(b)(3) case, *Devlin* involved an appeal of a mandatory class settlement certified and approved under Federal Rule of Civil Procedure 23(b)(1), and in which absent class members were not provided an opportunity to opt out of the proposed settlement. *Devlin* underscored the

significance of this feature, noting that "in light of the fact that petitioner had no ability to opt out of the settlement, *see* Fed. Rule Civ. Proc. 23(b)(1), appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate." *Devlin*, 536 U.S. at 10–11. Here, however, the binding effect of the class settlement on petitioners results not from the mandatory terms of Rule 23(b)(1) (as in *Devlin*), but from petitioners' election to remain in a proposed settlement after reviewing its terms and being given a choice to remain in the settlement or avoid it. Petitioners' independent election to remain in the proposed settlement presented for approval to the district court cuts off the requisite causation element of Article III standing.

"[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.*, at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)) (other internal quotations and citations omitted). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." *Id.*, at 560–61 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976)). Third, it must be

"likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.*, at 561 (quoting *Simon*, 426 U.S. at 38, 43)). Because an actual controversy must persist throughout all stages of the litigation, "standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)).

Petitioners' appeal fails to satisfy the second of these elements because the injury it asserts—the settlement's improper release of petitioners' claims against the class action defendant—was caused by petitioners' choice to join a proposed settlement and be bound by it, as opposed to being fairly traceable to the actions of any defendant, appellee, or court. Petitioners "cannot manufacture standing merely by inflicting harm on themselves." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013). Had petitioners elected to exclude themselves from the proposed settlement (as several absent class members did),[2] their claimed injury would not have occurred because the settlement would have no binding effect on them.

Just last term, this Court held that appellate courts lack jurisdiction to review claims of individual putative class plaintiffs who voluntarily dismissed

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[2] The district court's Final Judgment And Order Of Dismissal With Prejudice confirmed that "[t]welve individuals timely and validly excluded themselves from the Settlement." Pet. App. 64, ¶ 7.

their case after their class certification motion was denied. *See Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017). Although the Court's majority opinion grounded its holding on the notion that such a dismissal was not a "final decision" within the meaning of 28 U.S.C. § 1291, *id.*, at 1707, the concurring opinion by Justice Thomas, joined by the Chief Justice and Justice Alito, reasoned that the petitioners lacked Article III standing to appeal a judgment of dismissal with prejudice they had voluntarily requested be entered against them. *Id.*, at 1716–17 (Thomas, J., concurring).[3]

Justice Thomas' concurring opinion in *Baker* explained that:

> When the plaintiffs asked the District Court to dismiss their claims, they consented to the judgment against them and disavowed any right to relief from Microsoft. The parties thus were no longer adverse to each other on any claims, and the Court of Appeals could not "affect the[ir] rights" in any legally cognizable manner. *Ibid.* Indeed, it has long been the rule that a party may not appeal from the voluntary dismissal of a claim, since the party consented to the judgment against it. *See, e.g.*, *Evans v. Phillips*, 4 Wheat. 73, 4 L.Ed. 516

[3] The majority opinion, having found that the appeal did not satisfy the "final decision" statutory requirement of § 1291, explained that "[b]ecause we hold that § 1291 does not countenance jurisdiction by these means, we do not reach the constitutional question, and therefore do not address the arguments and analysis discussed in the opinion concurring in the judgment." *Id.*, at 1712.

(1819); *Lord v. Veazie*, 8 How. 251, 255–256, 12 L.Ed. 1067 (1850); *United States v. Babbitt*, 104 U.S. 767, 26 L.Ed. 921 (1882); *Deakins v. Monaghan*, 484 U.S. 193, 199–200, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988).

Id., at 1717.

The same reasoning applies to petitioners' attempt to appeal the judgment to which they consented by electing to remain in the Rule 23(b)(3) settlement class. Whether consent to the underlying judgment is manifested by filing a notice of voluntary dismissal (as in *Baker*) or by failing to exclude oneself from a proposed Rule 23(b)(3) settlement class (as here) should not matter. The Article III appellate standing inquiry is the same. In each instance, the party who consented to the entry of judgment lacks Article III standing to appeal because entry of the judgment that binds that party is traceable to that party's own action.

B. Federal Rule of Civil Procedure 23(c)(2)(B) and the court-approved class notice permitted petitioners to reject the proposed settlement by excluding themselves from the settlement class. *See* Dkt. No. 56–4 at 86–94 (class settlement notice). Had they made that choice instead of electing to remain in the settlement class, petitioners would be free to continue litigating against Google because "neither a proposed class action nor a rejected class action may bind nonparties." *Smith v. Bayer Corp.*, 564 U.S. 299, 315 (2011). Excluding themselves from the settlement class would result in petitioners no longer being part of the then-existing class litigation, and likely would have required them

to pursue their claims individually.[4] But the inability to proceed as part of a class constitutes no cognizable injury, much less an injury-in-fact sufficient to support Article III standing. *See American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 234–35 (2013).

C. This Court has never addressed whether *Devlin*'s recognition of appellate standing of an objector who lacked an opportunity to opt out of a proposed class settlement extends to objectors who had such an opportunity but elected to remain in the settlement class. At least two federal appellate courts, however, have suggested *Devlin* may be limited to mandatory class settlements. *See, e.g.*, *In re AAL High Yield Bond Fund v. Deloitte & Touche, L.L.P.*, 361 F.3d 1305, 1310, n.7 (11th Cir. 2004) (noting that the inability to opt out from the Rule 23(b)(1) settlement class is a "feature of *Devlin* [that] has led at least one court to believe that it applies only to mandatory class actions") (citing *Ballard v. Advance America*, 349 Ark. 545, 549 (2002)); *In re General American Life Ins. Co. Sales Practices Litig.*, 302 F.3d 799, 800 (8th Cir. 2002) ("Because the Court relied upon the mandatory character of the class action, we question whether *Devlin*'s holding applies to opt-out class actions certified under Rule 23(b)(3)."). While other federal circuit courts have upheld *Devlin*'s application to Rule 23(b)(3) settlement appeals by

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[4] If enough class members had excluded themselves from the settlement class to satisfy Rule 23(a)(1)'s numerosity requirement, it is conceivable that a separate class comprised of those who had opted out of the initial settlement class could be proposed.

objecting class members, those decisions focus on whether *Devlin* recognized party status for such objectors. *See Churchill Village, L.L.C. v. General Electric*, 361 F.3d 566, 572 (9th Cir. 2004) (reasoning that *Devlin* extends appellate standing even to objectors to a Rule 23(b)(3) class because "the *Devlin* Court made clear that objectors should be considered parties"); *Fidel v. Farley*, 534 F.3d 508, 513 (6th Cir. 2008) (objector to a Rule 23(b)(3) settlement class had standing to appeal under *Devlin* because such an objector "is nonetheless a 'party' for the purpose of appealing the district court's approval of the . . . class action settlement"). Party status, however, generally is a necessary but not always sufficient requirement for appellate standing. A litigant who voluntarily dismisses his case lacks standing to appeal the dismissal despite unquestionably having party status.

D. Whether petitioners have standing to appeal the district court's approval of the Rule 23(b)(3) class settlement presents a constitutional question about the power of federal courts of appeals under Article III, section 2. The inquiry does not present a policy choice. Any claim that failure to recognize petitioners' appellate standing would leave nobody with standing to appeal the district court's approval of the settlement should be irrelevant. Time and again, this Court has recognized that, "[o]ur system of government leaves many crucial decisions to the political processes. The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing." *Schlesinger v. Reservists Committee to Stop*

the War, 418 U.S. 208, 227 (1974) (quoted in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 489 (1982) and in *Clapper*, 568 U.S. at 420). Further, the question presented—to what extent may *cy pres* class settlements be approved consistently with Rule 23—is not inevitably destined to evade this Court's review if petitioners' appellate standing is rejected. In a future case, when a district court denies approval of a *cy pres* class settlement, the named settling parties would have standing to seek interlocutory appeal under 28 U.S.C. § 1292(b) and ultimately review by this Court.[5]

E. In the context of a mandatory Rule 23(b)(1) class, *Devlin* addressed whether unsuccessful objectors

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[5] 28 U.S.C. 1292(b) provides in relevant part: "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order." 28 U.S.C. § 1292(b). The decision whether to approve a proposed class settlement is, by its terms, a "controlling question of law" whose outcome could materially advance the litigation, and petitioners concede that a difference of opinion as to its resolution exists. *See* Pet. at 16 ("The Ninth Circuit's decision conflicts with decisions of the Third, Fifth, Seventh, and Eighth Circuits—and arguably the Second Circuit, as well—on the fundamental question of when it is 'fair, reasonable, and adequate' for a class action settlement to award money not to class members but to third parties unconnected to the litigation.").

to a class settlement could appeal the approval of the settlement if they had not sought first to intervene before the district court. *See Devlin*, 536 U.S. at 6. The Court held that intervention was not required for these objectors to maintain an appeal. *Id.*, at 14. In a Rule 23(b)(3) settlement class, where the absent class member is granted the opportunity to reject the settlement and avoid its binding effect, intervention is irrelevant to the Article III standing inquiry. Whether the absent class member first seeks to intervene to challenge the settlement does not alter that the injury asserted by the unsuccessful objector—the approved settlement's release of his claims—is traceable to the objector's own decision to remain in the settlement class. A prior intervention motion—regardless of its success—does not change this conclusion and therefore does not affect the Rule 23(b)(3) objector's failure to fulfill the causation element of Article III appellate standing.

* * *

Amicus respectfully submits that the Court should dismiss the writ of certiorari and vacate the judgment of the Ninth Circuit for lack of Article III jurisdiction. Appellate jurisdiction is logically antecedent to, and must be addressed before this Court can reach, the merits of the petition. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). In so arguing, *amicus* takes no position on the substantive issue raised by petitioners—the extent to which *cy pres* class settlements may be approved. *Amicus'* sole interest is in the federal

courts' appellate jurisdiction under Article III of the Constitution.

BACKGROUND

1. "The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (internal quotations omitted). Federal Rule of Civil Procedure 23 sets forth the requirements for maintenance of a class action in federal court.

a. Under Rule 23, the party seeking certification must first satisfy Rule 23(a)(1)-(a)(4), which requires the action or the class representative to meet numerosity, commonality, typicality, and adequacy of representation criteria. Second, the proposed class must meet at least one of the three requirements of Rule 23(b).

b. When a district court certifies a class under Rule 23(b)(3), the court must direct to identifiable class members the best practicable notice under the circumstances. The class notice must state the: nature of the action; definition of the class; claims, issues, or defenses asserted; right of a class member to enter an appearance through an attorney; right to have the court exclude from the class any class member requesting to be excluded; time and manner for requesting exclusion; and, binding effect of a class judgment. Fed. R. Civ. P. 23(c)(2)(B).

c. By contrast, when a district court certifies a class under either Rule 23(b)(1) or Rule 23(b)(2), no notice is required and no right to be excluded from the class is provided. Fed. R. Civ. P. 23(c)(2)(A).

2. Settlements involving certified classes or proposed settlement classes require court approval. Fed. R. Civ. P. 23(e). No class settlement may be approved by the court unless notice of the proposed settlement was provided to the members of the certified or settlement class who would be bound by the settlement. Fed. R. Civ. P. 23(e)(1)(B). If the proposed settlement involves a class certified under Rule 23(b)(3), the court may require that members of that class be given another opportunity to exclude themselves from the class before approval of the settlement. Fed. R. Civ. P. 23(e)(4). There is no provision for members of a Rule 23(b)(1) or Rule 23(b)(2) settlement class to be excluded from the class or settlement. These classes therefore are commonly called mandatory classes.

3. Rule 23 provides any member of either a proposed settlement class or a certified class subject to a proposed settlement the right to file objections to the proposed settlement. Fed. R. Civ. P. 23(e)(5)

4. *Devlin* involved a member of a Rule 23(b)(1) settlement class who had objected to the proposed settlement. *Devlin*, 536 U.S. at 3. The district court approved the class settlement and entered judgment that bound the class member despite his objection because he had no opportunity to request exclusion from the settlement class. *Id.*, at 3, 10. By contrast, this case involves

a settlement class certified under Rule 23(b)(3) in which all class members were given an opportunity to request exclusion from the settlement class and avoid being bound by a judgment approving the settlement. Dkt. 52–4, at 86–94 (class notice). Petitioners did not request exclusion from the settlement class. They elected instead to remain in the settlement class, consenting to be bound by the settlement and judgment if their objections were overruled and the settlement approved. After the district court approved the proposed settlement, petitioners appealed from the district court's entry of judgment. They claimed standing to appeal under *Devlin*. Pet. Br. at 3.

5. *Amicus* respectfully submits that the Court should dismiss the petition and vacate the judgment of the Ninth Circuit for lack of Article III jurisdiction. *Devlin* recognized the appellate standing of members of a mandatory settlement class who had no opportunity to request exclusion from a settlement they did not want. Petitioners were given a choice to avoid the binding effect of the settlement by requesting exclusion from the settlement class, but they chose to remain in the class and consent to the settlement's binding effect if it were approved. Any injury petitioners claim, therefore, was not caused by the district court's approval of the settlement and entry of judgment, but by petitioners' voluntary election. Because petitioners' asserted injury is not fairly traceable to the district court's entry of judgment, petitioners lack Article III standing to appeal that judgment.

ARGUMENT

I. PETITIONERS LACK ARTICLE III STANDING TO APPEAL THE APPROVAL OF A SETTLEMENT THEY ELECTED TO JOIN.

This Court lacks jurisdiction to review petitioners' appeal of the district court's judgment approving a class action settlement that petitioners elected to join. Once petitioners were given an opportunity to reject the settlement by opting out of the proposed Rule 23(b)(3) settlement class but, nevertheless, elected to remain in the class, they broke any chain of causation between their claimed injury and the district court's approval of the settlement. Petitioners' sole argument to the contrary—that *Devlin* provides them with standing to appeal—is misplaced because *Devlin* applied in a mandatory class settlement certified under Rule 23(b)(1) where class members had no opportunity to opt out. Properly considered, *Devlin* does not support petitioners' appellate standing in this non-mandatory class setting.

A. *Devlin* Does Not Support Appellate Standing For Members Of Non-Mandatory Settlement Classes.

Petitioners' reliance on *Devlin* is misplaced. *Devlin* considered whether absent members of a mandatory Rule 23(b)(1) settlement class who objected to, but were not provided with any opportunity to exclude themselves from, a proposed settlement could appeal the approval of that settlement. *See Devlin*, 536 at 3.

Although the Fourth Circuit framed the issue as one of standing, *Devlin* clarified that the proper inquiry was not about standing, but about whether the objecting class members were "parties" entitled to appeal. As this Court explained:

> Although the Fourth Circuit framed the issue as one of standing, 265 F.3d, at 204, we begin by clarifying that this issue does not implicate the jurisdiction of the courts under Article III of the Constitution. As a member of the retiree class, petitioner has an interest in the settlement that creates a 'case or controversy' sufficient to satisfy the constitutional requirements of injury, causation, and redressability.
>
> . . . .
>
> Because petitioner is a member of the class bound by the judgment, there is no question that he satisfies these three requirements. The legal rights he seeks to raise are his own, he belongs to a discrete class of interested parties, and his complaint clearly falls within the zone of interests of the requirement that a settlement be fair to all class members. Fed. Rule Civ. Proc. 23(e).
>
> What is at issue, instead, is whether petitioner should be considered a 'party' for the purposes of appealing the approval of the settlement. We have held that 'only parties to a

> lawsuit, or those that properly become parties, may appeal an adverse judgment.'

Id., at 6–7 (quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (*per curiam*)).

Devlin resolved the question by holding that members of the settlement class were "parties" because, upon certification of the settlement class and approval of the class settlement, they were bound by the settlement and judgment. *See id.*, at 10. The Court explained: "What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing." *Id.*

Devlin, therefore, unquestionably establishes that members of a settlement class have "party" status for purposes of considering their entitlement to appeal. But while being a party generally is a necessary condition to appeal, it is not always sufficient. For example, a party who voluntarily dismisses his case in the district court lacks standing to appeal that dismissal, despite assuredly having been a "party" to the proceedings. *See Baker*, 137 S. Ct. at 1717 (Thomas, J., concurring) (collecting cases). To have standing, the appellant must show not only that it is a party entitled to appeal but also that it meets the injury-in-fact, causation, and redressability triad of constitutional standing. *See Lujan*, 504 U.S. at 560–61.

In *Devlin*, where a Rule 23(b)(1) class was involved, the injury, causation, and redressability elements were uncontroversial, as the Court recognized. *Devlin*, 536 U.S. at 7. Because the *Devlin* objectors had no opportunity to opt out of the settlement, the district court's approval of the mandatory class settlement directly affected these objectors by binding them to a settlement they had no desire to accept but no chance to reject. That is why *Devlin* singled out the mandatory nature of the Rule 23(b)(1) class. *Id.*, at 10. The only remaining question was whether objectors who were not named parties and never sought to intervene could, nevertheless, be considered "parties" entitled to appeal. That is the inquiry *Devlin* resolved in the objectors' favor.

Petitioners' mistake attempts to transpose *Devlin*'s uneventful recognition of redressable injury caused by a district court's approval of a Rule 23(b)(1) mandatory class settlement onto the altogether different context of a Rule 23(b)(3) elective class where no settlement can bind a class member without his consent. In the former, the district court's approval of the settlement creates the injury that may be redressed on appeal by having the approval and judgment reversed. But in the latter Rule 23(b)(3) scenario, it is the absent class member's election to remain in the settlement and be bound by it that results in dismissal of the class member's claims. *Devlin* assists petitioners by confirming that they have party status, but *Devlin*'s recognition of standing to appeal an unwanted mandatory settlement does not confer standing on Rule 23(b)(3) class

members who elect to remain in a settlement class after being given an opportunity to opt out.

K. Petitioners' Election To Remain In The Settlement Class And Be Bound By The Settlement Defeats Their Standing To Appeal The Approval Of That Settlement.

Unlike the *Devlin* objectors, petitioners were provided with an opportunity to exclude themselves from the settlement class and avoid being bound by any judgment approving the settlement. A dozen class members did so. Pet. App. 64, ¶ 7. Their rights are unaffected by the settlement or judgment, and they can continue litigating their claims. The class settlement notice approved by the district court informed petitioners that: "Class Members who do not want to be part of the settlement must complete a form requesting to be excluded" and "[i]f you do not exclude yourself, you forever give up the right to sue Google for all of the claims that this Settlement resolves." Dkt. No. 52–4, at 91 (class notice). Petitioners elected to remain in the settlement class, and never requested to opt out.

By remaining in the settlement class instead of opting out of a settlement they found objectionable, petitioners consented to be bound by the terms of any judgment approving the proposed class settlement. Parties who consent to the entry of judgment lack standing to appeal that judgment. *See Baker*, 137 S. Ct. 1717 (Thomas, J., concurring) (citing cases). This had been the English practice even before the Constitution;

a consent decree could not be set aside by appeal or bill of review, except in case of clerical error. *Webb v. Webb*, 3 Swanst. 658 (1676); *Bradish v. Gee*, 1 Amb. 229; Daniell, Chancery Practice (6th Am. Ed.) 973–974.

That rationale carried over into the American judicial system. For over a century, this Court has recognized the inability of a party to appeal a judgment to which it has consented:

> If the bill is to be regarded as a bill of review (and in its ultimate aspect, at least, it seems impossible to regard it otherwise), the proceedings are clearly objectionable, on the following grounds:—
>
> *First*, The decree sought to be set aside and reversed was a consent decree. It is a general rule that against such a decree a bill of review will not lie.

Thompson v. Maxwell, 95 U.S. 391, 397 (1877).

Whether consent to the underlying judgment is manifested by filing a notice of voluntary dismissal (as in *Baker*) or by failing to exclude oneself from a proposed Rule 23(b)(3) settlement class (as here) should not matter. The Article III appellate standing analysis is the same. In each instance, the party who consented to the judgment lacks Article III standing to appeal because entry of the judgment that binds that party is traceable to that party's own action.

While remaining in the settlement class, petitioners filed objections to the proposed settlement with the

district court. Their aim in staying in the settlement class evidently was to urge disapproval of the settlement by arguing against it in their objections. That purpose, however, does not create appellate standing because it does not override petitioners' agreement to be bound by the settlement if it were approved over their objections. Similar logic applied in *Baker*, where the plaintiffs voluntarily dismissed their case not intending to abandon their claims, but to appeal the district court's denial of their class certification motion. *Baker*, 137 S. Ct. 1711. This Court rejected their attempt to appeal. It is the parties' voluntarily undertaken actions, not the goals behind the acts, that matter. Standing "is not a question of motivation." *Doremus v. Board of Ed. of Borough of Hawthorne*, 342 U.S. 429, 435 (1952).

C. This Court Has Not Addressed Whether *Devlin* Applies To Appeals From Non-Mandatory Class Settlements.

This Court has never addressed whether *Devlin* extends to objectors who had an opportunity to opt out of a proposed class settlement but elected to remain in the settlement class. Federal courts of appeal that have addressed the elements of Article III standing have allowed for the possibility that *Devlin* may not apply to Rule 23(b)(3) or other non-mandatory settlement classes where an opportunity to opt out exists. *See, e.g.*, *In re AAL High Yield Bond Fund, L.L.P.*, 361 F.3d at 1310, n.7 (noting that the inability to opt out from the Rule 23(b)(1) settlement class is a "feature of *Devlin* [that]

has led at least one court to believe that it applies only to mandatory class actions"); *In re General American Life Ins. Co. Sales Practices Litig.*, 302 F.3d at 800 ("Because the Court relied upon the mandatory character of the class action, we question whether *Devlin*'s holding applies to opt-out class actions certified under Rule 23(b)(3).").

Other courts have ruled *Devlin* supports appellate standing of objectors in non-mandatory class settlements. These courts have focused not on the elements of Article III standing, but on *Devlin* according party status to objecting class members. *See Churchill Village*, 361 F.3d at 572 (reasoning that *Devlin* extends appellate standing even to objectors to a Rule 23(b)(3) class because "the *Devlin* Court made clear that objectors should be considered parties"); *Fidel*, 534 F.3d at 513 (objector to a Rule 23(b)(3) settlement class had standing to appeal under *Devlin* because such an objector "is nonetheless a 'party' for the purpose of appealing the district court's approval of the . . . class action settlement"). As discussed in Section I.A *supra*, however, party status is a necessary but not necessarily sufficient condition for appellate standing. The pertinent inquiry is whether a finding that the injury, causation, and redressability elements of standing are undeniably present when a class member is forcedly bound to a settlement without an opportunity to opt out also applies when a class member voluntarily elects to remain in a settlement class and be bound by the approved settlement. Answering that question, instead of merely acknowledging that class members are

parties, leads to the conclusion that objectors in non-mandatory class settlements lack appellate standing.

D. Appellate Standing Is A Constitutional Requirement, Not A Policy Choice.

"In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Determining a litigant's Article III standing, therefore, is a constitutional question, not a policy consideration. For this reason, this Court has declined to accord standing to interested parties who fail to meet the injury, causation, and redressability elements. This is so even where failing to recognize a party's Article III standing results in no other party having standing to raise the question presented. *See Clapper*, 568 U.S. at 420. That objectors to a class action settlement may be the only parties with an interest in appealing the approval of the settlement, therefore, does not suffice to overlook their failure to meet the requirements of appellate standing.

Further, the question petitioners raise—the extent to which *cy pres* settlement may be approved under Rule 23—is one that can be raised by parties with standing to appeal. For example, in a future case in which a district court denies final approval of a *cy pres* class settlement, the named parties to the settlement agreement would have standing to seek interlocutory appellate review of that denial under 28 U.S.C.

§ 1292(b). Any outcome of that appeal then could be reviewed by this Court.

By petitioners' own account, the question presented is one that would satisfy § 1292(b)'s criteria for interlocutory review. Deciding whether a proposed *cy pres* class settlement terminating the litigation may be approved under Rule 23 obviously would materially advance the litigation before the district court and, as petitioners document, there is a difference of opinion among the federal appellate courts on resolving this question. *See* Pet., at 16 (noting circuit split on question presented).

Aside from embroiling federal courts of appeals in matters that are not justiciable, overlooking the lack of Article III appellate standing of objectors to non-mandatory class settlements has real pragmatic consequences. Giving these objectors free reign to appeal even from judgments to which they consented has created a pernicious cottage industry of "professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests." *Shaw v. Toshiba America Information Sys., Inc.*, 91 F. Supp. 2d 942, 973 (S.D. Tex. 2000) (quoted in *Devlin*, 536 U.S. at 21 (Scalia, J., dissenting). A leading treatise explains the *modus operandi* of these so-called "professional objectors":

> Most often, the objections are nonmeritorious. However, the objectors may appeal a court's denial of their objections, and that appeal might take several years in many circuits; during that time period, the class's recovery

> and, as importantly for these dynamics, class counsel's fee, will likely not be distributed. Faced with the possibility of having to wait several years for their fee, class counsel are willing to pay some amount to the objectors to drop their objections. The more often they do so, the more attractive they make the practice of filing such objections, leading some lawyers to organize their legal practice around objecting, that is, to become professional objectors.

William B. Rubenstein, Newberg On Class Actions § 13:21 (5th ed. 2012) (citations omitted).

E. Intervention Is Irrelevant To Determining Petitioners' Appellate Standing.

Devlin resolved the party status of absent class members who object to a class settlement. It held that objecting class members did not need to move to intervene to be considered parties. *Devlin*, 536 U.S. at 10, 14. With that question resolved, the appellate standing of class members who, like petitioners, object to non-mandatory class settlements is unaffected by whether these objectors attempted to intervene in the district court.

Petitioners lack Article III appellate standing for failure to meet the causation requirement. This failure would not have been cured by petitioners seeking to intervene before filing their objections. Even if their intervention motion had been denied, the injury they claim—the dismissal of their claims because of the settlement—would be caused by their own election to

remain in the settlement class. As *Devlin* clarifies, petitioners, as members of the settlement class, were parties to the action. Denial of any intervention motion, therefore, would not deprive them of anything. The net result is that all objecting class members are parties, but only those who object to settlements in mandatory classes have standing to appeal. Intervention is irrelevant to that result.

II. PETITIONERS' ARTICLE III STANDING MUST BE ADDRESSED BEFORE CONSIDERING THE MERITS OF THE PETITION.

The question *amicus* addresses—whether petitioners have Article III standing to appeal the approval of the Rule 23(b)(3) class settlement—differs from the question presented by petitioners. Nevertheless, the Court should address petitioners' standing first because that inquiry questions this Court's jurisdiction to hear the petition and, therefore, is antecedent to the merits. *See Ex parte McCardle*, 74 U.S. (7 Wall.) at 514. The limits on *cy pres* class settlements under Rule 23 may well present an important issue. *See Marek v. Lane*, 571 U.S. 1003 (2013) (Roberts, C.J., statement respecting denial of certiorari). Given *amicus'* credible assertion that petitioners lack appellate standing, however, the Court should "put aside the natural urge to proceed directly to the merits of [an] important dispute and to 'settle' it for the sake of convenience and

efficiency." *Raynes v. Byrd*, 521 U.S. 811, 820 (1997) (footnote omitted).

CONCLUSION

The writ of certiorari should be dismissed, and the judgment of the Ninth Circuit should be vacated, for lack of Article III jurisdiction.

Respectfully submitted,

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July 13, 2018